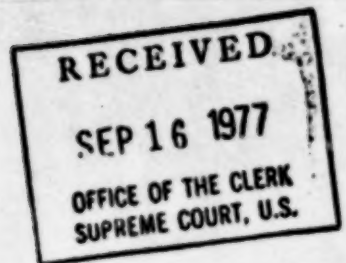


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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 76-6942

ENSIO RUBEN LAKESIDE,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the
State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

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17 OPINIONS BELOW

18 The petition for certiorari herein omits the unofficial
19 (Pacific Reporter) citation to the opinion of the Oregon Supreme
20 Court in this case. It is 561 P.2d 612 (1977).

21 JURISDICTION

22 The decision of the Oregon Supreme Court in this matter was
23 filed on March 17, 1977. A timely petition for rehearing was
24 denied on April 12, 1977, and the petition for certiorari was
25 filed within 90 days of the latter date, on June 17, 1977. The
26 jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).
27

28 QUESTION PRESENTED

29 Does the giving of a jury instruction in a criminal case,
30 over the defendant's objection, that no inference may be drawn
31 from the fact that the defendant did not testify violate either
32 the privilege against self-incrimination guaranteed by the Fifth
Page 1 - BRIEF IN OPPOSITION

1 Amendment or the right to assistance of counsel guaranteed by the
2 Sixth Amendment?

3 N.B. For the reasons set forth below, respondent does not
4 concede that petitioner's Sixth Amendment claim is properly
5 raised and preserved.

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CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's statement of the constitutional provisions
involved in this case is accepted, with the qualification that
respondent does not concede that petitioner's Sixth Amendment
claim is properly raised and preserved, for the reasons set
forth below.

STATEMENT OF THE CASE

Respondent supplements petitioner's "Statement of Facts" as
follows.

In petitioner's trial for Escape in the Second Degree, the
trial court instructed the jury that no inference was to be drawn
from the fact that defendant did not testify in his own behalf,
using the language set forth at page 4 of the petition for cer-
tiorari herein. Defendant excepted to the giving of this in-
struction as follows:

THE COURT: . . . Does the defendant have any
further exceptions?

[DEFENSE COUNSEL]: Yes, I have one exception.

I made this in Chambers prior to the closing
statement. I told the Court that I did not want
an instruction to the effect that the defendant
doesn't have to take the stand, because I felt
that that's like waving a red flag in front of the
jury, so I do have an exception to the instruction
given to the effect that the defendant doesn't
have to take the stand, and that that should not
be considered against him.

THE COURT: The defendant did orally request
the Court just prior to instructing that the Court
not give the usual instruction to the effect that
there are no inferences to be drawn against the

1 defendant for failing to take the stand in his
2 own behalf.

3 The Court felt that it was necessary to give
4 that instruction in order to properly protect the
5 defendant, and therefore the defendant may have
6 his exception. (Tr. 235).

7 Petitioner's brief in the Oregon Court of Appeals argued
8 only that the giving of the instruction in question violated his
9 Fifth Amendment right against self-incrimination, as is apparent
10 from the manner in which he stated the question presented on
11 appeal.

12 Did the trial court violate appellant's rights,
13 guaranteed by the Self-Incrimination Clause of the
14 Fifth Amendment to the United States Constitution,
15 by instructing the jury concerning appellant's fail-
16 ure to testify, when appellant objected to the giv-
17 ing of this instruction prior to the charge to the
18 jury? (Appellant's Brief, at 1).

19 As petitioner acknowledged in his petition for rehearing in the
20 Oregon Supreme Court, he first attempted to inject a Sixth Amend-
21 ment claim into this case during oral argument in the Court of
22 Appeals (Petition for Rehearing, at 2). Neither the opinion of
23 the Court of Appeals nor the opinion of the Oregon Supreme Court
24 discusses that claim, as petitioner complained in his petition
25 for rehearing (Id., at 2-3)

26 REASONS FOR DENYING THE WRIT

27 I. Petitioner's Fifth Amendment Claim Is Not Substantial 28 Enough To Warrant Review.

29 It is true, as the petition for certiorari herein points out,
30 that there is a division of authority on the question of whether
31 the giving, over objection, of an instruction that no inference
32 is to be drawn from the fact that the defendant in a criminal case
33 has not testified in his own behalf violates the privilege against
34 self-incrimination, although it appears that the majority of juris-
35 dictions which have considered the question hold, like Oregon,
36 that it does not. See Anno., "Accused's Failure To Testify --

1 Charge," 18 A.L.R.3d 1335 (1968). If the mere fact that the
2 jurisdictions of this country are divided over the question were
3 sufficient to create a question substantial enough to warrant
4 resolution by this Court, the present case would seem to be a
5 satisfactory one in which to resolve it. We submit, however,
6 that the result reached by the Oregon Supreme Court is clearly
7 the correct one and that, rather than disturbing that result,
8 this Court should postpone its consideration of the question
9 until it is confronted with a case holding to the contrary.

10 In essence, petitioner is asking this Court to extend its
11 holding in Griffin v. California, 380 U.S. 609 (1965), and to say
12 that the Fifth Amendment not only prohibits argument by the pro-
13 secution and instructions by the trial court which invite the
14 jury to draw inferences adverse to a criminal defendant who does
15 not testify, but also prohibits any reference to the fact that
16 the defendant did not testify, even when the reference is in a
17 context intended to prevent the jury from drawing such inferences.
18 Such a holding would be tantamount to a holding that a jury
19 which is cautioned to draw no inference from the fact that the
20 defendant does not testify is not capable of following such an
21 instruction, but cf. Frazier v. Cupp, 394 U.S. 731, 736 (1969),
22 or at least, to a holding that the defendant has a constitutional
23 right to gamble that a jury which is not cautioned to avoid
24 drawing adverse inference from defendant's silence will be less
25 likely to do so than one which is. Neither holding, we submit,
26 is sound law, and this Court should not declare either to be the
27 law.

28 II. Petitioner's Sixth Amendment Claim Is Neither Properly
29 Raised Nor Substantial Enough To Warrant Review.

30 Alternatively, petitioner claims that the giving of the in-
31 struction that no inference may be drawn from the fact that he
32 did not testify, over the objection of his attorney, constitutes

1 a denial of his Sixth Amendment right to the assistance of counsel
2 (Petition, at 8-10). As pointed out in our Statement of the Case,
3 above, petitioner first attempted to raise this claim on oral arg-
4 ument in the Oregon Court of Appeals and neither of the Oregon
5 appellate courts addressed it. For this reason, we do not con-
6 cede that petitioner's Sixth Amendment claim is properly before
7 this Court. Assuming, arguendo, that it is, the claim is without
8 merit.

9 The gist of petitioner's Sixth Amendment argument seems to
10 be that any trial court ruling which interferes with defense
11 counsel's tactics or strategy deprives an accused of the effective
12 assistance of counsel, at least to the extent of that interference
13 and to the extent that the interference is erroneous. This reason-
14 ing would make a Sixth Amendment issue of every trial court ruling
15 adverse to every defendant represented by counsel in a criminal
16 case. It is not surprising that neither of the Oregon appellate
17 courts dignified this contention with a response, if they did
18 regard it as properly before them. Nor is it surprising that none
19 of the cases cited in the petition for certiorari offers the
20 slightest support for it.

21
22 CONCLUSION

23 For the above reasons, the petition for a writ of certiorari
24 should be denied.

25 Respectfully submitted,

26 JAMES A. REDDEN
27 Attorney General of Oregon
28 AL J. LAUE
29 Solicitor General
30 THOMAS H. DENNEY
Assistant Attorney General
Counsel for Respondent

31 September 12, 1977

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